IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 990.

FIRST NATIONAL BANK OF CHICAGO, AS GUARDIAN OF THE ESTATES OF AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI AND AZA FAKHRI, MINORS: AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI AND AZA FAKHRI, MINORS, BY FIRST NATIONAL BANK OF CHICAGO, AS GUARDIAN OF THEIR ESTATES,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION,

Respondent.

ANSWER TO PETITIONERS' MOTION TO STRIKE.

Petitioners' motion is unjustified. That petitioners refuse to accept the facts and law as viewed by the Court of Appeals presents no basis for the charges made therein. All that is stated in respondent's brief is accurate.

The Charge That Respondent Has Made an Untrue Statement With Respect to the Terms of a Policy of Insurance That Is Not Involved in This Litigation.

Initially, it must be noted that petitioners' entire discussion of this charge is irrelevant. No Court of review would consider the action taken by an insurer not involved in the litigation before it, in its interpretation of the insurance policy sued upon.

However, respondent will make a brief response to the charge. The payment made by Continental Casualty Company is inexplicable. Respondent has no knowledge of what might have prompted that payment, but submits that it was not justified under its policy. The policy issued by Continental, just as the policy issued by respondent, allowed the insured to change his itinerary only upon certain conditions with which Mrs. Fakhri did not comply. Both policies intended to limit the insured to a single itinerary scheduled before departure. However, *this common intent is expressed in different terms.*

Continental's policy refers to "a ticket for each such flight". This might be interpreted as referring to the several separate flights which together constitute an itinerary and this might be construed as an ambiguous expression of the requirement that the insured adhere to a scheduled itinerary.

In contrast, the policy issued by respondent is unmistakable. It expressly states that the insured must be "traveling upon a transportation ticket or pass covering the whole of said airline trip" and it thereby explains the reason for the requirements of the "substitute trip" provision. The requirement therein that the ticket be exchanged for a ticket which covers part of the originally scheduled

itinerary assures the insured's adherence to his obligation to remain upon a single itinerary; any flight taken upon a ticket purchased after initial departure must necessarily, by virtue of its exchange for the original ticket, be a true "substitute trip".

Failing to comply with these requirements, Mrs. Fakhri abandoned the original itinerary and engaged in a series of separate trips unrelated to and not in furtherance thereof. If the Court had found that coverage existed under such circumstances, coverage would have been afforded for *each* of the unlimited separate trips which she might have taken before finally returning to Paris and undertaking to complete the originally scheduled itinerary.

In other words, although the intent of each policy may be basically the same, Fidelity & Casualty Company's policy is set forth in unmistakable terms. The rule that ambiguous contracts will be construed against the insurer could not be applied to the Fidelity & Casualty Company's policy; however, it may have prompted Continental to pay the claim. Indeed, respondent cannot imagine any other legitimate reason which would justify that payment.

It is in view of the foregoing that respondent stated and now reasserts that the policies are materially different. It is therefore apparent that the petitioners may have the right to argue that the policies are not materially different, but they have no right to charge respondents with having made untrue statements.

Respondent respectfully submits that petitioners' charge is a mere subterfuge designed to draw this Court's attention away from the only factors here relevant—the terms of the policy, the circumstances surrounding Mrs. Fakhri's death and the issue whether there is any reason why this Court should grant a *writ of certiorari*. Indeed petitioners

themselves support this statement. If petitioners honestly consider respondent's statement to be untrue, why didn't they object thereto in the Court of Appeals. In the reply brief filed therein, respondent made the identical analysis of Continental's policy:

> "In contrast to defendant's policy, the policy issued by Continental does not reflect the intent to limit coverage to a single scheduled itinerary by requiring that the insured be traveling upon a ticket or pass covering the entire airline trip." (Reply brief p. 8.)

Petitioners did not challenge that statement either by written word or upon oral argument; it is curious that they now choose to do so.

In view of the foregoing, respondent respectfully submits that petitioners' charge is unwarranted. Indeed it is a mere excuse for petitioners to exercise their demonstrated propensity to rely upon the irrelevant and prejudicial even when it is unfounded in the record. For instance, petitioners redundantly and repeatedly refer to their status as minors. This is not a matter of relevant concern. Indeed if the rights of the parties are to be judged on the basis of need, then petitioners should also refer to their extremely substantial guardianship estate presently pending in the Probate Division of the Circuit Court of Cook County under docket number 61 P 8345 (Confer: *Republic of Iraq v. First National Bank of Chicago*, 350 F. 2d 645, 1965, 7th Cir.).

Petitioners make frequent reference to the circumstances of the issuance of the policy and state as established fact that Mrs. Fakhri received the policy but no extra copy thereof. On the contrary, there is no evidence whatsoever in the record about the details of this transaction which occurred more than ten years ago and such details cannot be established by generalizing about a business custom

which varies according to time and place, as well as the practice of a particular insurer. *In Re Estate of Pohn*, 67 Ill. App. 2d 227, 214 N. E. 2d 553 (1966).

The Charge That Respondent Has Misstated the Law.

Apparently petitioners are inclined to loosely label as false all with which they disagree, because they even charge that respondent's interpretation of Illinois law is untrue. Respondent respectfully submits that this charge exceeds the bounds of advocacy. There is a real difference between erroneously construing the law and stating an untruth. Indeed, petitioners' charge is indirectly leveled against the Court of Appeals because that Court agreed with respondent's view of Illinois law. That Court stated:

> "Under Illinois law, which we are bound to follow in this case, the terms of a written contract determine the rights of the parties thereto. This applies also to flight insurance. See *Mutual of Omaha Insurance Co.* v. *Russell*, 402 F. 2d 339 (10th Cir. 1968); *Thompson* v. *Fidelity & Casualty Co. of New York*, 16 Ill. App. 2d 159, 148 N. E. 2d 9 (1958).
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> "An insurance company has the right to limit coverage on a policy it issues and when it has done so, the plain language of the limitations must be effectuated. *Dreher* v. *Aetna Casualty & Surety Co.*, 83 Ill. App. 2d 141, 226 N. E. 2d 287 (1967); *Thompson* v. *Fidelity & Casualty Co. of N. Y., supra; Continental Casualty Co.* v. *Phoenix Construction Co.*, 46 Cal. 2d 423, 296 P. 2d 801 (1956); *Crosse* v. *Supreme Lodge Knights and Ladies of Honor*, 254 Ill. 80, 98 N. E. 2d 261 (1912)". (App. B-11.)

If an incorrect construction of the law is tantamount to the stating of an "untruth' then respondent must point out to this Court that the Court of Appeals correctly interpreted Illinois law. The applicable rule established by the Illinois Supreme Court is that a policy of insurance will

be enforced in accordance with its terms. The contract will not be rewritten by the Court. *Blume* v. *Pittsburgh Life & Trust Co.*, 263 Ill. 160, 104 N. E. 1031 (1914); *Crosse* v. *Supreme Lodge Knights & Ladies of Honor*, 254 Ill. 80, 98 N. E. 261 (1912); *Pioneer Insurance Co.* v. *Alliance Insurance Co.*, 374 Ill. 576, 590, 30 N. E. 2d 66 (1940); *Reiner* v. *St. Paul Fire & Marine Insurance Co.*, 106 Ill. App. 2d 210, 245 N. E. 2d 655 (1969).

The cases that support this proposition are legion. No Illinois decision, including the *Carlson* decision relied upon by petitioners, deviates therefrom. Indeed even if the *Carlson* Court did render a contrary ruling, such intermediate Court of review is not empowered to overrule the Illinois Supreme Court.

Additionally, the *Carlson* decision does not in fact adopt the rule espoused by petitioners. That Court interpreted an accident policy, different from the one before this Court, which provided benefits for loss "resulting directly, and independently of all other causes from accidental bodily injury." The question presented was whether this clause was to be interpreted as allowing recovery for any injury proximately caused by accident even if that injury had been caused in part by a preexisting condition and the Appellate Court expressly noted that its resolution required it to "interpret(e) the insurance contract." (76 Ill. App. 2d 196.) In interpreting that contract, the Court looked to its terms as reasonably intended by the parties.

In contrast, petitioners do not claim that the policy in the instant case is ambiguous and subject to a contrary interpretation. Rather they claim that the contract should be ignored and rewritten by the Court and this astounding proposal *is not* acceptable under Illinois law.

WHEREFORE, respondent respectfully prays that petitioners' motion be denied in its entirety and respectfully asks that petitioners' charges be stricken from the record.

Respectfully submitted,

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